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IN THE

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Supreme Court of the United States

October Term 1942.

No.

1057

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MARGARET CAHN RAPHAEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner above named respectfully presents to this Honorable Court her petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, to review its decision in the case of *Commissioner of Internal Revenue v. Raphael*, 133 Fed. (2d) 442.

I.

Summary Statement of the Matter Involved.

In 1915 and 1917 the petitioner and other members of her family were induced by the fraudulent misrepresentations of their agents to sell certain lands in California for sums far below their true value. In 1940 the United States District Court for the Southern District of Cali-

fornia, in an action instituted by the defrauded owners and their successors in interest, rendered judgment against the agents for \$651,579.71, of which \$253,500.00 was damages measured by the difference between the true value of the lands sold and the consideration received by the owners, and \$398,079.71 was damages measured by interest on \$253,500.00 to the date of judgment. The total amount of the judgment, together with interest thereon from the date of entry thereof in the sum of \$92,644.93, was paid in full on January 19, 1940.

The petitioner received a 17/300th part of this recovery. She was then a non-resident alien not engaged in trade or business within the United States and had no office or place of business therein. Under Section 211(a)(1)(A) of the Internal Revenue Code such non-resident aliens are subject to a gross income tax, but only on income from sources within the United States as defined by Section 119(a), and only on certain specified kinds of income, those as to which the tax is required by Section 143(b) to be withheld and paid at the source.

No part of the recovery in the said fraud action was withheld at the source, but the respondent attempted to assess a tax on petitioner's share of certain portions of the total sum recovered. The Board of Tax Appeals held that petitioner was taxable on her share of the \$92,644.93 interest paid on the judgment, and petitioner does not seek a further review of that decision. The petitioner, however, does seek a review of the decision of the Circuit Court of Appeals that petitioner is taxable on her share of the \$398,079.71 included in the judgment. This decision was based on the opinion of the Circuit Court of Appeals that the \$398,079.71 was *interest on an interest-bearing obligation* and constituted a *periodical gain*.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240, subdivision (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stats. 938; 28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals for the Ninth Circuit which is sought to be reviewed was filed and entered on February 1, 1943 [R. 103]. A petition for rehearing was denied on March 15, 1943 [R. 104].

III.

Questions Presented.

(1) In an action for deceit, where the trial court in its discretion includes in the award of damages an amount measured by interest on the value of that of which the plaintiffs were defrauded, does the additional amount so awarded constitute interest on an interest-bearing obligation within the meaning of Section 119(a)(1) of the Internal Revenue Code?

(2) Does the amount so included in the award of damages constitute "annual or periodical gains, profits and income" within the meaning of Section 211(a)(1) (A) of the Internal Revenue Code?

IV.

Reasons Relied on for Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals that the \$398,079.71 was received as interest on an interest-bearing obligation is in conflict with the following applicable decisions of this Court:

Brown v. Webster, 156 U. S. 328, 39 L. Ed. 440;
Phelps v. United States, 274 U. S. 341, 344, 71 L.
Ed. 1083, 1085;

Jacobs v. United States, 290 U. S. 13, 17, 78 L. Ed. 142, 144;

Shoshone Tribe v. United States, 299 U. S. 476, 496, 81 L. Ed. 360, 369;

United States v. Klamath & Moadoc Tribes, 304 U. S. 119, 123, 82 L. Ed. 1219, 1223;

Kieselbach v. Commissioner of Internal Revenue, 63 S. Ct. 303, 87 L. Ed. (Adv. Op.) 281, 284;

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 561, 76 L. Ed. 484, 489-490;

Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 86, 79 L. Ed. 211, 214.

(2) The decision of the Circuit Court of Appeals that the \$398,079.71, although not periodical income, nevertheless constituted a periodical gain within the meaning of the phrase "annual or periodical gains, profits and income," introduces into the law of taxation a recognition as "gains" of unrealized and wholly uncertain increments in value, in conflict with the following applicable decisions of this Court:

North American Oil Consolidated v. Burnet, 286 U. S. 417, 423, 76 L. Ed. 1197, 1200;

United States v. Safety Car Heating & Lighting Co., 297 U. S. 88, 93-4, 99, 80 L. Ed. 500, 504, 507.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

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